Filed 8/27/19 Malone v. Taylor CA1/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

SYLVIA MALONE et al., Plaintiffs and Respondents, v. GREGORY TAYLOR, Defendant and Appellant, GLENDA L. TAYLOR, Defendant.	A151906 (Solano County Super. Ct. No. FSC045628)

Plaintiffs Sylvia Malone [1], Frank Taylor, and Gary Taylor, and defendants Gregory Taylor and Glenda L. Taylor were co-owners of the real property that is the subject of this partition action (Code Civ. Proc., tit. 10.5, § 872.010 et. seq.[2]). On November 15, 2016, the court entered an interlocutory judgment, ordering the property's partition by sale and reserving jurisdiction over the distribution of the sale proceeds. Following a bench trial, the court entered its order distributing the sale proceeds on May 3, 2017.

[1] For convenience and clarity, we shall initially refer to individuals by their full names and thereafter by their first names. We intend no disrespect by this practice.

[2] All further unspecified statutory sections refer to the Code of Civil Procedure.

Gregory has filed an appeal challenging both the interlocutory judgment ordering partition by sale and the order distributing the sale proceeds.[3] We conclude we have no appellate jurisdiction to consider Gregory's challenges to the interlocutory judgment, and accordingly we dismiss his appeal from that judgment. We further find no merit to Gregory's arguments directed at the order distributing the sale proceeds, and accordingly we affirm that order.

---

[3] In his notice of appeal, Gregory indicates the appeal is from a judgment or order entered on "6-29-17." The record contains no June 29, 2017 judgment or order; however, based on his briefs, we assume the appeal is from the May 3, 2017 order. In the absence of any showing of prejudice, we deem the notice of appeal to be from the May 3, 2017 order. (Cal. Rules of Court, rule 8.100(a)(2).)

While Glenda was named as a defendant in the partition action, she has not filed a notice of appeal and therefore she is not a party to this appeal.

FACTS[4]

A. Background

On August 14, 1996, siblings Sylvia, Gary, Frank, and Gregory each acquired a 25 percent interest in the property (on which is situated a residence) after the December 1995 death of their mother and following an order of distribution entered in their mother's estate. Thereafter, Gregory deeded one-half of his 25 percent to his wife, Glenda. At the time of the partition action, the property interests were as follows: Sylvia (25% interest), Frank (25% interest), Gary (25% interest), Gregory (12-1/2% interest), and Glenda (12-1/2% interest). Since December 1995, at various times, Frank and Gary lived in the residence. In 2004 and through the time of the filing of the partition action,

---

[4] The facts are taken from the undisputed documents in the clerk's transcript, and the reporter's transcripts, which were submitted as part of the record on appeal and an augmented record that was filed pursuant to our March 5, 2019 order. We set forth only those facts as are necessary to address Gregory's appellate issues.

Gregory has also filed a request for judicial notice asking us to consider certain probate court documents concerning his deceased mother's estate (last will and testament and notice of petition to administer the estate) (hereinafter referred to as Exhibit 1 probate documents) and a "hand written summary" of "home remodeling improvements, maintenance and repairs," together with copies of bills, invoices, and checks noted in the summary, which represent expenditures made by defendants when they lived on the property (hereinafter referred to as Exhibit 2 expenditures documents). Gregory asserts we may take judicial notice of the documents because the information in the documents is referred to in the record on appeal and the parties' trial testimony, the omission or rejection of documents by the trial court was due to plaintiffs' delay or resistance to exchanging discovery, and the probate court documents were filed in the probate department of the Superior Court of Solano County. We deferred consideration of the request until this time. We deny the request for judicial notice for several reasons: (1) the record does not disclose that any of the documents were either admitted or lodged in the trial court and Gregory does not set forth exceptional circumstances justifying the grant of judicial notice (see *Vons Companies, Inc. v. Seabest Foods, Inc.* (1996) 14 Cal.4th 434, 444, fn. 3.); (2) the Exhibit 1 probate documents are not necessary to our decision on the appeal as we later explain in our discussion of the issues (see *Davis v. Southern California Edison Company* (2015) 236 Cal.App.4th 619, 632, fn. 11.); and (3) the Exhibit 2 expenditure documents are not the proper subject of judicial notice as they are not "capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy" (*Ragland v. U.S. Bank National Assn*. (2012) 209 Cal.App.4th 182, 193).

Gregory and Glenda lived in the residence together, at times, with their adult son Santino Taylor, Senior.

B. Partition Action

On July 13, 2015, Sylvia, together with Gary and Frank, filed an action in partition seeking to divide the property by sale, naming Gregory and Glenda as defendants.[5] In the complaint, plaintiffs described the property and the interests of the co-owners. It further alleged that partition by sale was more equitable than division in kind because the real property could not be physically divided. Plaintiffs had retained the services of a realty agency to list and sell the property, but Gregory had refused to sign the listing agreement and refused to sell the property. Plaintiffs asked, among other things, that "the costs of

---

[5] Gregory contends that, under California Rules of Court, rule 3.300, plaintiffs and "in particular" their counsel, had a continuing duty to inform the trial court of any related cases that involved "claims against, title to, possession of, or damages to the same property," which included the 1996 probate proceeding concerning the estate of the siblings' deceased mother and a January 2010 small claims action for rents against Gregory, which resulted in a April 12, 2010 judgment in favor of Gregory. (See Cal. Rules of Court, rule 3.300(a)(3)(b)(f).) He then argues that plaintiffs' failure to follow the rules "contributed to a lengthy, overblown, and a wasteful misuse of precious court resources. Any assignment of causation for delays are those manufactured by respondents as demonstrated in the record on appeal." We see no merit to Gregory's claim of prejudicial error. California Rules of Court, rule 3.300(b), specifically advises all parties, both plaintiffs and defendants, that "[w]henever *a party in a civil action knows* or learns that the action or proceeding is related to another action or proceeding pending, dismissed, or disposed of by judgment in any state or federal court in California, *the party* must serve and file a Notice of Related Case." (Cal. Rules of Court, rule 3.300(b); italics added.) Consequently, as a party defendant to the partition action Gregory also had a continuing duty and obligation to notify the trial court of the related actions, and he does not inform us that he complied by filing the required notice of related cases. Moreover, the purpose of the "related case" rule is to allow, if appropriate, the assignment of related cases to a single judge or department. (Cal. Rule, rule 3.300(h).) Once a notice of related cases is filed, the trial court, "on notice to all parties, *may* order the cases, including probate . . . cases, be related and *may* assign them to a single judge or department." (Cal. Rules of Court, rule 3.300(h)(1); italics added.) Because the trial court is not required to make an order assigning related cases to a single judge or department, Gregory's claim that a different outcome would have resulted had a notice of related cases been filed in this case is, at best, speculative.

partition, and of this action, such as expenses of referees and other disbursements, including reasonable attorney fees incurred/expended by [p]laintiffs for the common benefit of the parties, by ordered paid by the [d]efendants in proportion to their respective interest in the Property," and that the sale proceeds, after the payment of all costs of partition and sale, be distributed in proportion to the respective interests of plaintiffs and defendants.

In their answer filed on August 19, 2015, Gregory and Glenda admitted some of the complaint's allegations, denied other allegations, and, denied, on information and belief, other allegations. They also alleged ten affirmative defenses: failure to state a cause of action, statutes of limitation, laches, estoppel, waiver, defendants acted for lawful business reasons and in good faith, plaintiffs had an adequate remedy at law, equitable indemnity/proportional fault, plaintiffs' claims were barred by doctrine of unclean hands, and "additional, as yet unstated, affirmative defenses." In their "prayer for relief," defendants asked for the following in the event of partition: that the court allot to them that portion of the property they owned; that any liens held by defendants be paid before any partition or distribution of sale proceeds; costs of suit and attorney fees to the extent permitted by law; and any other and further relief as the court may deem proper. After the filing of the answer, on April 12, 2016, substitution of counsel forms were filed in which counsel withdrew from representing Gregory and Glenda and they commenced representing themselves individually in propria persona.

On August 4, 2016, plaintiffs filed a motion for an order compelling defendants to execute a contract for the sale of the property at an agreed-on purchase price of $199,000. Plaintiffs asserted that all parties, including defendants, had agreed to sell the property for $199,000 and signed a listing agreement with that amount. While the parties had received a "full price cash offer" of $199,000, and plaintiffs had accepted the offer and signed the purchase contract, defendants refused to accept the offer as Gregory claimed there was another offer for more money albeit he had not produced that offer.

On August 22, 2016, the parties appeared in court for consideration of plaintiffs' motion to compel defendants to agree to sell the property for $199,000. Plaintiffs'

counsel informed the court that the parties had a purchase offer at the listed price of $199,000 since May 6, 2016, but Gregory refused to sign the purchase contract even though it had been more than 90 days since the offer had been made. When questioned by the court, Gregory stated he was not prepared to sell the property at the listed price of $199,000, even though he had agreed and signed the listing agreement for that price. Gregory claimed he had signed the listing agreement, even though he thought $199,000 was below market value, because he believed the property would remain on the market for 90 days to get the best offer, but someone had offered the listed price of $199,000 within two weeks of the posted listing and the property was taken off the market. Although several people had inquired about buying the property, Gregory admitted there was no other written offer to purchase the property. In response, plaintiffs' counsel explained that the property had not been taken off the market, but the realtor had not received any other offers during the 90 day period. To facilitate the matter, plaintiffs offered to allow the property to remain listed for sale until the end of September to see if any other offers were made to purchase the property.

The court denied plaintiffs' motion to compel the sale of the property for $199,000, without prejudice to plaintiffs' renewal of the motion. The court informed Gregory that, if appropriate, he should confer with plaintiffs' counsel concerning the entry of a stipulated interlocutory judgment, agreeing that the property could be partitioned by sale; once sold, if the parties could not agree on the distribution of the sale proceeds, the purchase moneys would be held in an account until the court finally determined the matter.

On October 3, 2016, the parties again appeared in court. At that time, plaintiffs' counsel informed the court the parties had received another offer to purchase for $199,000, all cash, to close in seven days, no contingencies, but that, "as a result of just timing," the latest 30-day listing agreement at an asking price of $235,00 had not been in effect for the full 30 days. Upon Gregory's request, the court continued the matter to October 19 to allow "two weeks" for additional offers.

On October 19, 2016, the court reconvened the matter. Plaintiffs' counsel informed the court that the parties had received a purchase offer of $225,000, to close in 10 days. Plaintiffs' counsel indicated that if defendants agreed to accept that offer the matter concerning the sale would be resolved. Defendants stated they would sign the purchase agreement that day. The court scheduled a bench trial for January 31, 2017 regarding the distribution of the sale proceeds and a pretrial conference for January 27.

On November 15, 2016, the court filed an interlocutory judgment (denoted "an order after hearing") ruling, in pertinent part: "All parties having met, conferred and agreed, the court makes the following orders: [¶] 1. The real property . . . [is] to be sold pursuant to the offer and acceptance executed by all plaintiffs and defendants on October 19th, 2016. The sale is to close regardless of anybody's position on any outstanding liens on the property. The legal description of said real property is: . . . . [¶] 2. The net proceeds of sale of the real property shall be retained in the Title Insurance Company's Escrow Account or such other account as the Escrow Company customarily handles those funds. [¶] 3. All parties are to sign any escrow instruction[s] that are necessary to accomplish the orders for the sale of the real property . . . . [¶] 4. The court reserves jurisdiction [over all] issues concerning the distribution of proceeds. . . ."

C. Distribution of Sale Proceeds Proceedings

1. January 27, 2017 Pretrial Conference

On January 27, 2017, the court convened the scheduled pretrial conference. Plaintiffs' counsel stated the property had been sold and the sale proceeds had been placed in his attorney-client trust account with defendants' agreement. Counsel further informed the court that the only issue remaining was the distribution of the sale proceeds. Plaintiffs were seeking an order directing defendants to pay for plaintiffs' counsel fees and costs incurred for the partition action. It was defendants' position that if the court intended to grant plaintiffs' request for attorney fees and costs, then Gregory wanted to request reimbursement of $26,000, representing the cost of remodeling and maintaining the property while defendants had lived there (hereinafter also referred to as "compensatory adjustment"). The court informed Gregory that there might be a question

as whether he was entitled to a compensatory adjustment for several reasons, including that he had not made a claim for compensatory adjustment in his answer to the partition action. The court informed Gregory that it would consider any evidence he offered that showed that a previous judicial determination prevented plaintiffs from relitigating the issue of his compensatory adjustment claim.

2. January 31, 2017 Bench Trial

On the morning of the scheduled bench trial, plaintiffs filed a trial brief, arguing that the court was limited to and required to distribute the sales proceeds pursuant to section 873.820, and, consequently, any other monetary claims by either party were precluded, including Gregory's claim for a compensatory adjustment. Plaintiffs also asked for an order directing defendants to pay plaintiffs' attorney fees ($15,280.34) and costs ($797.20) incurred in bringing the partition action under section 874.040, which allowed the court to "apportion the cost of partition among the parties in proportion to their interest or make such other apportionment as [may be] equitable." In support of their request, plaintiffs asked the court to consider the "dilatory tactics to delay and prevent the sale of the real property" used by Gregory and his former counsel concerning "vague, ambiguous, and non-responsive" answers to plaintiffs' discovery requests, and defendants' failure to timely inform plaintiffs' counsel of the withdrawal of their counsel and that they were representing themselves in propria persona. Gregory acknowledged he had a copy of plaintiffs' trial brief.

The parties stipulated that the property's listed purchase price was $199,000, the house was sold for $225,000, and the net escrowed amount to be distributed was $203,210.27. Before taking any testimony, the court asked Gregory to respond to plaintiffs' contention that the distribution of the sale proceeds was limited to the court's consideration of only four issues: (1) the payment of the expenses of the sales, which had already been resolved; (2) the payment of the costs attributable to the partition action, which did not include any claim by Gregory for a compensatory adjustment; (3) payment of any liens on the property, which Gregory conceded none existed; and (4) distribution of the residue in proportionate shares to be determined by the court. Gregory believed

the parties should pay their own attorney fees. The court informed Gregory that section 874.010 authorized the court to award reasonable attorney fees incurred or paid by a party for the common benefit. The court further explained that "in this kind of context 'common benefit' means the attorney's fees expended [in counsel's] office . . . that had to be incurred or else the property would still be just sitting there not partitioned and the parties would still be locked in a debate about whether or not the property should be held or sold. And [counsel's] expenditures of attorney's fees basically caused the sale. [¶] You have something to say about the price of the sale and . . . that will play in . . . to the issue of what's for the common benefit. But you didn't spend attorney's fees on that particular point. . . . [¶] . . . [A]t the time you were debating with [plaintiffs' counsel] and his clients about what should be the sale price you didn't have an attorney . . . , so you weren't spending attorney's fees on that debate." The court acknowledged Gregory had spent attorney fees to answer the partition action, but informed him his "answer doesn't say anything . . . about contributions that [were made] to fix up or maintain the property . . . ."

Gregory argued the parties should pay their own fees because, at various times, all of the siblings had occupied the residence. When plaintiffs wanted to sell the house defendants resisted the sale of the property since they lived in the house and did not want to move. Therefore, plaintiffs had to file the partition action for the sale of the property. Once plaintiffs had filed the partition action and the house was to be sold, Gregory was able to get a better purchase price "[f]or the good of everybody." The court then informed Gregory that to recover any attorney fees he would have to produce evidence "as to how [his] attorney's fees contributed to that increase in the price." Gregory admitted his attorney fees had not contributed to the increase in price because he had only retained counsel to file an answer to the partition action. The court explained to Gregory that his claim that he did not want to be thrown out of his home was not accurate because he was not the sole owner of the residence, it was a home in which he and Glenda had an aggregate one-quarter ownership share, and that the attorney fees incurred by plaintiffs

were for the common benefit of all the owners because the issue of ownership had to be resolved by the partition action.

Having considered the parties' arguments, the court set forth the contours of the bench trial. It would hear evidence concerning plaintiffs' attorney fees expenditures including the costs to file the partition action and "[p]rofessional services that were rendered to pursue and push the partition forward which would be for the common good." The court would also allow Gregory to present evidence "if you have any, to the effect that your attorney's fees expenditure was for the common good." But Gregory could not present "any evidence . . . of presale expenses toward general maintenance and improvement of the property" because those items were not recoverable under section 873.820. To which Gregory replied, "Okay."

The court heard testimony from Sylvia, Gary, Frank, Gregory, Glenda, and Santino. The court also admitted into evidence various exhibits and took judicial notice of certain documents that the parties had previously filed with the court during pretrial litigation. Following argument by plaintiffs' counsel and Gregory, the court issued a "tentative decision under [section] 632," finding as follows:

"Code of Civil Procedure Section 873.820 is the exclusive means of dividing the proceeds, the net proceeds of the sale in this case, and it's amplified a little bit in Part (b) under Code of Civil Procedure Section 874.010 concerning attorney's fees. [¶] [Section] 873.820 refers to first in order; (a) The expenses of sale. That was completed in escrow. So that's no longer a relevant consideration for the Court. [¶] Part (b) refers to other costs of sale, and that can include attorney's fees that were generated for the common benefit as described in [Section] 874.010.

"I find that the attorney's fees as adjusted that have been charged by [plaintiffs' counsel] are reasonable and that they were generated for the common benefit . . . . [¶] One of the reasons that they are reasonable is that it's clear that from at least 2015 and maybe earlier that [Gregory] and maybe [Glenda] also didn't want to sell the property, and they were resisting the sale of the property. So the use of the property was a subject that was greatly in dispute. [¶] . . . [¶] . . . The Court finds there was an informal

agreement among . . . the four siblings . . . to the effect that any one of them who stays in the property has to take care of at least a couple of certain fixed expenses which apparently are, garbage and sanitation bills, and taxes. [¶] There's not enough evidence to determine whether or not there were other fixed expenses that should also be paid by the person or people who are living in the property. And part of the dispute here is what happens when one of the four siblings breaks that informal agreement that they had? There's nothing wrong with that informal agreement, by the way, it happens all the time among siblings. [¶] The attorney's fees were [engendered] in part because of resistance, primarily, from Gregory . . . . The fact that he was not taking active steps to resolve the dispute that the parties were having. [¶] . . . [¶] The Court finds that [Gregory] also delayed the partition, the actual sale, in several different ways. [¶] One, having to do with some back-and-forth about . . . whether he was represented or not and the substitution of [attorney] issues. Once a lawyer is in the lawyer stays in until it's announced that the lawyer is out. And apparently [Gregory's former counsel] was acting on [Gregory's] behalf even though he was officially out of the case by way of a substitution of attorneys. And [Gregory] admitted that some of [his former counsel's] letters [Plaintiffs' Exhibits 9, 10, 12, 14, and 15] . . . were either at [Gregory's] direction or they were for his benefit. Those things also increase the attorney's fees and they were further evidence that [Gregory] was going to resist the sale. [¶] . . . [¶].

"The Court finds that the attorney's fees were incurred for the common benefit and not as generated by any one particular party as to [the $26,000.00 increase in the sale price]. [¶] . . . [¶] As to the balance . . . after you take out the $26,000.00, whatever proportion is left of attorney's fees . . . , the Court finds that that was caused by [Gregory] and it was for the common benefit of all parties. So [defendants] are going to have to pay that leftover portion out of their share. [¶] . . . [¶] [T]he Court finds there's no evidence to support [Gregory's] claim that his attorney's fees that he incurred were for the common benefit. And so the Court is not allowing any credit or any other benefit to [Gregory] based on the attorney's fees that he spent in the case for [his former counsel], . . .and . . . there's no evidence of how much that was. . . ." The court informed the parties that they

were going to have to meet and confer "to get the exact numbers" for the distribution of the attorney fees and costs.

The court directed plaintiffs' counsel to prepare a final decision consistent with the court's tentative decision pursuant to section 632 and California Rules of Court, rule 3.1590(a)(b)(c). The court continued the matter to February 24, 2017 for the purpose of finalizing the monetary calculations.

3. Post-Trial Proceedings

On February 16, Gregory filed several documents: (1) a request for a statement of decision under section 632; (2) a request for judicial notice (Evid. Code, § 452), asking the court to consider billing invoices that Gregory had received from his former counsel, showing that he had incurred an aggregate of $5,000 for attorney fees and costs for services between August 4, 2015 and April 12, 2016; and (3) an "[o]pposition" to plaintiffs' trial brief, challenging on various grounds plaintiffs' request for an apportionment of their attorney fees and costs on an equitable basis. Gregory's former counsel also filed a declaration, arguing that no award of attorney fees was required based on any purportedly dilatory conduct by Gregory and former counsel.

At the scheduled February 24, hearing, the court commenced the proceedings by describing the status of the litigation: "We had a court trial on January 31, 2017, at which time, the Court received and considered evidence including exhibits, and both sides rested at the end of that trial. The matter was declared submitted to the Court at that time, and that means the trial is over in terms of the evidence and any argument that parties might make. [¶] The Court issued a tentative decision at the end of that trial and requested [plaintiffs' counsel] to prepare a decision based on the tentative decision. I'm not aware that there's any proposed decision in the court file. I haven't seen one up to this point." The court denied, on various grounds including untimeliness, Gregory's requests for relief in the documents that had been filed on February 16 by Gregory and his former counsel. However, the court was concerned about Gregory's claim that the court was without subject matter jurisdiction to apportion the parties' responsibility for plaintiffs' attorney fees and costs on an equitable basis, rather than on a proportional

basis according to the parties' ownership interests in the property. On its own motion, the court recalled that portion of its tentative decision considering its apportionment of plaintiffs' attorney fees and costs on an equitable basis, and directed the parties to file supplemental briefs limited to the issue of the court's subject matter jurisdiction. The parties filed the requested supplemental briefs. Additionally, Gregory filed a request for judicial notice asking the court to consider certain evidence to impeach certain statements made by plaintiffs' counsel concerning an April 12, 2010 small claims judgment that had been entered in favor of Gregory, finding that he owed no money on a claim for rent made by Frank during the cotenancy.

On May 3, the court reconvened the matter to consider the outstanding issue of its subject matter jurisdiction to apportion plaintiffs' attorney fees and costs on an equitable basis. Following argument by plaintiffs' counsel and Gregory, the court ruled it had subject matter jurisdiction to adjudicate and order an equitable distribution of plaintiffs' attorney fees and costs as originally stated in its tentative decision. In so ruling, the court rejected Gregory's argument that the court was divested of subject matter jurisdiction to adjudicate an equitable distribution of attorney fees and costs because no referee had been appointed to report on the apportionment issue, and plaintiffs had failed to comply with certain statutory requirements necessary to maintain an action in partition. The court made no specific ruling on Gregory's request for judicial notice.

The court issued a written order on May 3, 2017, setting forth its findings consistent with its tentative decision following the January 31 bench trial. The court also incorporated in its order a document labelled "Attachment A," in which, in pertinent part, it made the following calculations apportioning attorney fees and costs:

"Plaintiffs have calculated the apportionment of attorney fees and the total distribution of net proceeds of sale based upon the Court's finding that Defendants were responsible for gaining an additional $26,000.00 in gross sale proceeds. The total attorney's fees and court costs to be deducted solely from Defendants' share of the net sale proceeds is $14,310.70. This sum is calculated as follows:

"The total attorney's fees and costs is $16,077.20 [sic]. The total sale price was $225,000.00. This is $26,000.00 more than the original offer of $199,000.00. The gross sale proceeds were therefore increased by 11.56% ($26,000 ÷ 225,000).

"11.56% of the attorney's fees should therefore be divided equally between all parties and the remaining 88.44% of attorney's fees should be paid by Defendants. [¶] 11.56% of the total attorney's fees is $1,766.37 ($15,280 x .1156). [¶] $1,766.37 should be deducted from the sale proceeds before any other adjustments or distribution. [¶] The $797.20 in costs has not been apportioned because this cost is the same no matter what the sale price was. [¶] Subtracting $1,766.37 from the total attorney's fees of $15,280.00 leaves a balance of $13,513.50 in attorney fees and $797.20 in court costs for a total of $14,310.70 to be paid solely by Defendants from their share of the net sales proceeds."

After deducting the equally apportioned attorney fees of $1,766.37 (payable to plaintiffs' counsel), the remaining sales proceeds balance of $201,443.90, was equally apportioned to the siblings and Glenda, according to their proportionate ownership interests: Sylvia, Frank, and Gary, each received the gross sum of $50,360.97, and Gregory and Glenda, each received the gross sum of $25,180.48. The shares distributed to Gregory and Glenda were further reduced by the aggregate sum of $14,310.70, representing their "sole share" of the remaining attorney fees and costs payable to plaintiffs' counsel.

On June 29, 2017, Gregory, appearing in propria persona, filed a Judicial Council form notice of appeal, indicating he was appealing from the "judgment or order," which was "entered on (date): 6-29-17 [sic];" Gregory marked the boxes for, "Judgment after court trial," "An order after judgment under Code of Civil Procedure, § 904.1(a)(2)," and "An order or judgment under Code of Civil Procedure, § 904.1(a)(3)–(13)."

DISCUSSION

Preliminarily to our discussion of the issues, we note that, although Gregory is representing himself, "mere self-representation is not a ground for exceptionally lenient treatment. Except when a particular rule provides otherwise, the rules of civil procedure

must apply equally to parties represented by counsel and those who forgo attorney representation." (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 984–985.) Throughout his appellate briefs, and in a haphazard fashion, Gregory presents many facts for which there are no record citations, inadequate record citations, and incorrect record citations, and many arguments that are not set forth in separate point headings and which are not supported by proper record citations and statutory or case law authority, all in violation of the California Rules of Court governing the contents of briefs. (Cal. Rule of Court, rules 8.204(a)(1) ["[e]ach brief must:" . . , (B) "State each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority;" and (C) "Support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears"]; 8.204(2) ["[a]n appellant's opening brief must: . . . (C) Provide a summary of the significant facts limited to matters in the record"]; see *Duran v. U.S. Bank National Assn.* (2018) 19 Cal.App.5th 630, 650, fn. 16 ["[f]actual matters that are not part of the record . . . should not be referred to in a party's brief;" "[t]his rule applies to matters referenced at any point in the brief, not just in the statement of facts"]; see also *American Indian Model Schools v. Oakland Unified School Dist.* (2014) 227 Cal.App.4th 258, 284 [appellant's burden on appeal of demonstrating the trial court abused its discretion "includes supporting factual assertions by providing appropriate references to the record"]; *Regents of University of California v. Sheily* (2004) 122 Cal.App.4th 824, 826–827, fn. 1 (*Sheily*) ["[i]t is not the task of the reviewing court to search the record for evidence that supports the party's statement; it is for the party to cite the court to those references"].)

For Gregory's failure to comply with the rules, we could strike his briefs and either dismiss his appeal or require him to file new ones in compliance with the rules. (Cal. Rules of Court, rule 8.204(e)(2)(B).) However, we deem it appropriate and more efficient to merely disregard those facts and arguments that do not comply with the rules. (See *Sheily*, *supra*, 122 Cal.App.4th at pp. 826–827, fn. 1 ["[u]pon the party's failure" to comply with the rules of court governing the contents of briefs, "the appellate court need

not consider or may disregard the matter"].) Moreover, we have denied Gregory's request for judicial notice (*ante*, fn. 4), and accordingly we will disregard his reliance on the information in the documents that we have not judicially noticed as required under our local court rules. (Ct. App., First Div., Local Rules, rule 9(b), Judicial Notice Requests ["if the court, with or without notifying the parties, has deferred ruling on a judicial notice motion, any party may in its brief rely upon the items the moving party sought to have noticed;" "if the court denies the motion it will disregard any such matter or materials not judicially noticed"].)

With these limitations in mind, we now discuss the issues presented in Gregory's briefs.

I. Gregory's Challenges to November 15, 2016 Interlocutory Judgment Are Forfeited For Failure to File A Timely Notice of Appeal [6]

Gregory raises several arguments in support of his challenge to the court's November 15, 2016 interlocutory judgment, which directed partition by sale while reserving the court's jurisdiction to resolve any disputes concerning the distribution of sale proceeds. As Gregory's June 29, 2017 notice of appeal was filed more than 180 days after entry of the interlocutory judgment, his appeal is untimely.

In his opening brief, Gregory contends we have jurisdiction to hear his appeal because "[t]he judgment . . . granting partition of real property, including attorney's fees [is] appealable as a final judgment pursuant to Code of Civil Procedure section 904.1(a)(1)." However, Gregory fails to recognize that in this partition action the court issued two appealable documents: (1) the November 15, 2016 interlocutory judgment, granting partition by sale while reserving jurisdiction over the distribution of the sale proceeds; and (2) the May 3, 2017 order distributing the sale proceeds.

---

[6] In light of our determination, we do not address whether Gregory's challenges to the November 15, 2016 interlocutory judgment are also forfeited because it appears the interlocutory judgment was entered on the parties' consent. (See generally *Norgart v. Upjohn* Co. (1999) 21 Cal.4th 383, 399–403 [discussion of appealability of a consent judgment].)

As a reviewing court, we must consider the matter of our subject matter jurisdiction to hear an appeal "on [our] own initiative," even if the matter is not addressed by the parties. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 126–127.) Generally, no immediate appeal lies from an interlocutory judgment unless expressly authorized by statute. (*County of San Diego v. Arzaga* (2007) 152 Cal.App.4th 1336, 1343–1344; see § 904.1(a)(1).) However, section 904.1, subdivision (a)(9), authorizes a party to immediately appeal from "an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made." As the November 15, 2016 judgment was an "interlocutory judgment" within the meaning of section 904.1, subdivision (a)(9), Gregory was required to file a timely notice of appeal to obtain appellate review. (*Williams v. Wells Fargo Bank & Union Trust Co*. (1941) 17 Cal.2d 104, 106–107 [although interlocutory decree of partition "reserved the allowance of attorney's fees and costs of suit and other details until the final decree, it is clearly an interlocutory one within the meaning of [former] § 963 [now § 904.1, subd. (a)(9)] of the Code of Civil Procedure"]; *Sole Energy Co. v. Petrominerals Corp*. (2005) 128 Cal.App.4th 212, 239 ["[i]f an order is appealable, an aggrieved party must file a timely notice of appeal from the order to obtain appellate review"].) In the absence of any indication of the date of service of the interlocutory judgment, Gregory's time for filing a notice of appeal would have expired no later than 180 days after the date of entry. (Cal. Rules of Court, rule 8.104(a)(1)(C).[7]) The record on appeal includes only one

[7] California Rules of Court, rule 8.104(a), reads, in pertinent part: ". . . a notice of appeal must be filed on or before the earliest of" the following dates: (1) 60 days after the date of mailing by the clerk of the court of a document entitled "notice of entry" of judgment or appealable order; (2) 60 days after the date of service of a document entitled "notice of entry" of judgment or appealable order by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 180 days after the date of entry of the judgment. (See Cal. Rules of Court, rule 8.104(e) ["[a]s used in [8.104](a), . . . 'judgment' includes an appealable order if the appeal is from an appealable order"].)

notice of appeal, filed on June 29, 2017, which is more than 180 days after the date of entry of the interlocutory judgment, making the appeal untimely.

We see no merit to Gregory's contentions that, despite the lack of a timely notice of appeal, we may consider his arguments challenging the interlocutory judgment. First, we reject any implicit contention that a challenge to the interlocutory judgment may be based on the appeal from the May 3, 2017 order distributing the sale proceeds. While we have the authority to review intermediate rulings, decisions, or orders, which might necessarily affect a later order or judgment being appealed, we are not authorized to review any order or judgment from which an appeal might have been taken. (§ 906; see *Dakota Payphone, LLC v. Alcaraz* (2011) 192 Cal.App.4th 493, 509 [" '[a] party who fails to take a timely appeal from a decision or order from which an appeal might previously have been taken cannot obtain review of it on appeal from a subsequent judgment or order' "].) Additionally, neither our order granting Gregory's motion to augment the record to include certain reporter's transcripts nor plaintiffs' failure to address some of Gregory's arguments in their responsive brief, can confer subject matter jurisdiction on this court to review the interlocutory judgment. (See, e.g., *Keiffer v. Bechtel Corp*. (1998) 65 Cal.App.4th 893, 896 ["the adequacy of the court's subject matter jurisdiction must be addressed whenever that issue comes to the court's attention"]; *In re Estate of Brewer* (1909) 156 Cal. 89, 90 [because an appeal not timely taken "goes to the jurisdiction of the appellate court, . . . [t]he acts of the parties cannot confer jurisdiction on the court in a case withheld by the law from its jurisdiction"].) When a notice of appeal "has not in fact been filed within the relevant jurisdictional period—and when applicable rules of construction and interpretation fail to require that it be deemed in law to have been so filed—the appellate court, absent statutory authorization to extend the jurisdictional period, lacks all power to consider the appeal on its merits and must dismiss, on its own motion if necessary, without regard to

considerations of estoppel or excuse." (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.)

Second, the interlocutory judgment is not subject to collateral attack due to "the court lack[ing] personal or subject matter jurisdiction or exceed[ing] its jurisdiction in granting relief which the court had no power to grant." (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.) Here, the trial court acquired subject matter jurisdiction when plaintiffs filed their complaint for the partition of real property situated in the county. (§ 872.110 (a) ["[t]he superior court has jurisdiction of actions under this title [10.5 Partition of Real and Personal Property]]; see *Harrington v. Superior Court* (1924) 194 Cal. 185, 194 [plaintiff's filing of the complaint gave the court "authority over the subject-matter"].) The court acquired personal jurisdiction over Gregory when he filed his answer. (See, e.g., *Fireman's Fund Ins. Co. v. Sparks Construction, Inc*. (2004) 114 Cal.App.4th 1135, 1145–1146 [once appellants filed their answers "they became subject to the trial court's personal jurisdiction," and lost their right to later claim the judgment entered against them was void on the ground of lack of personal jurisdiction].) Gregory's argument that the court exceeded its authority in granting the interlocutory judgment is premised on "*nonjurisdictional* errors" (plaintiffs' complaint failed to state a cause of action; plaintiffs failed to properly file and publish notice of lis pendens or seek appointment of referee to report on evidence relating to reasonableness of attorney fees; and the trial court's interlocutory judgment was an abuse of discretion, unsupported by sufficient evidence, and, erroneous as a matter of law), "for which collateral attack will not lie." (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950, italics added [a failure to state a cause of action, insufficiency of evidence, abuse of discretion, mistake of law, "have been held nonjurisdictional errors for which collateral attack will not lie"]; see *Paules v. Elbert, Ltd.* (1955) 136 Cal.App.2d 326, 330 [default judgment entered in partition action on a complaint that failed to state cause of action was not void or subject to collateral attack as superior court admittedly had jurisdiction of the

parties and subject matter jurisdiction of actions for the partition of real property situated in the county]; *Rutledge v. Rutledge* (1953) 119 Cal.App.2d 114, 120 (*Rutledge*) [statutory requirement of filing of lis pendens immediately after filing of complaint in a partition action under former section 755 [now section 872.250] is "merely directory and in the absence of a showing of prejudice will not vitiate a decree"].)

In sum, we dismiss the appeal from the interlocutory judgment because no timely notice of appeal was filed and we are "without jurisdiction to consider [an appeal] which has been taken subsequent to the expiration of the statutory period." (*Estate of Hanley* (1943) 23 Cal.2d 120, 122; see Cal. Rules of Court, rule 8.104(b) ["[n]o court may extend the time to file a notice of appeal;" "[i]f a notice of appeal is filed late, the reviewing court must dismiss the appeal"].)

Consequently, we do not address Gregory's claim that the interlocutory judgment should be reversed and the sale set aside based on the following arguments: (1) the provisions of the will of the siblings' deceased mother; (2) the siblings' informal agreement as to the use and occupancy of the real property during the cotenancy; (3) plaintiffs' motive for seeking partition by sale; (4) plaintiffs' failure to compliance with certain statutory requirements to maintain the action for partition regarding the filing of a lis pendens, publication of summons and complaint, and method of service of pleadings; (5) the doctrines of unequal hands, judicial or collateral estoppel, laches, or adverse possession; and (6) the partition action by plaintiffs cotenants out of possession was barred by an earlier action in which Frank had unsuccessfully sought rent from defendants when they resided on the property during the cotenancy.

II. Gregory's Challenges to the May 3, 2017 Order

Gregory also presents several arguments challenging the May 3, 2017, order distributing the sales proceeds, none of which warrants reversal and a new trial.

A. Statement of Decision

Gregory argues the trial court erred in denying his request for a statement of decision following the court's issuance of its tentative decision at the conclusion of the January 31 bench trial. We disagree. Section 632 provides, in pertinent part: "In superior courts, upon the trial of a question of fact by the court, written findings of fact and conclusions of law are not required. The court shall issue a statement of decision . . . upon the request of any party appearing at the trial. The request must be made within 10 days after the court announces a tentative decision unless the trial is concluded within one calendar day or in less than eight hours over more than one day in which event the request must be made prior to the submission of the matter for decision." Here, Gregory's failure to request a statement of decision before the matter was submitted at the conclusion of the January 31 bench trial and his filing of a request for a statement of decision on February 16, rendered any request for a statement of decision untimely applying either of the time limitations listed in section 632.

We see no merit to Gregory's argument that he was not required to make a request for a statement of decision at the conclusion of the January 31 bench trial or within 10 days thereafter because the court had not rendered a decision on the actual sum of attorney fees for which he would be responsible. At the bench trial, the court admitted into evidence both Plaintiffs' Exhibit 5, described as the attorney fee billings sent to and received by Sylvia, and Sylvia's testimony that plaintiffs were seeking to recover attorney fees of $15,280.34 ($17,642.49 reduced by $2,362.15), and costs of $797.20. During the course of the trial, Gregory objected to the "numbers" in Plaintiffs' Exhibit 5, but he made no challenge to any specific sums on the ground that the attorney fees and costs were unreasonable. In its tentative decision the trial court addressed the matter, determined that plaintiffs' requested attorney fees were reasonable and for the common benefit of the parties, and specifically determined the manner in which attorney fees were to be apportioned for payment among the parties. Except for certain mathematical

computations to be made pursuant to the court's decision, the court's tentative decision effectively decided all of the principal controverted issues for which Gregory could have requested a statement of decision. (See *Earp v. Earp* (1991) 231 Cal.App.3d 1008, 1012 (*Earp*) [appellant's request for statement of decision as to entitlement to "tenant reserve fund," made at the time of a subsequent trial of remaining issues, was untimely, as reserve fund issue was earlier tried separately in a trial that lasted less than one day, and request for statement of decision was not made before the submission of the case for decision].)

We also see no merit to Gregory's argument that his time to request a statement of decision had been "tolled" until the court's "final tentative ruling" on May 3, by the court's reconsideration of its tentative decision on the threshold issue of its subject matter jurisdiction to provide for an equitable apportionment of the plaintiffs' reasonable attorney fees and costs. The court's reconsideration of its subject matter jurisdiction was not a question of fact and did it call into question any of its factual findings in its January 31 tentative decision. Rather, the issue of the court's subject matter jurisdiction was solely a question of law for which no statement of decision is required under section 632. (See *Earp, supra,* 231 Cal.App.3d at p. 1012 [appellant's request for statement of decision was properly denied as the issue to be resolved concerned a question of law].)

Even if Gregory were entitled to a statement of decision, the court's failure to provide a statement is not reversible per se, as he suggests, but an error subject to harmless error analysis. (See *F.P. v. Monier* (2017) 3 Cal.5th 1099, 1116 [court's failure to follow the correct procedure under section 632 by failing to give appellant sufficient time to serve and file objections to statement of decision was "subject to harmless error review," citing *Miller v. Murphy* (1921) 186 Cal. 344, 350 ["failure to serve proposed findings before court signed them was not prejudicial"].) "The main purpose of an objection to a proposed statement of decision is not to reargue the merits, but to bring to the court's attention inconsistencies between the court's ruling and the document that is

supposed to embody and explain that ruling." (*Heaps v. Heaps* (2004) 124 Cal.App.4th 286, 292.) Gregory's request for a statement of decision on twenty controverted issues, "went to the underlying *merits* of the proposed decision, not its *conformity* with what the trial court had previously announced." (*Ibid*.) Concededly, a "subsidiary purpose for objections to a statement of decision is also to identify issues presented during the trial which are not addressed in the decision." (*Id*. at p. 293.) However, Gregory did not assert that the court had failed to address any issues that were presented at the January 31 bench trial in his request for a statement of decision. In his appellate briefs, Gregory fails to explain how he was prejudiced by any purported failures in the court's tentative decision, and we see no prejudice.

Accordingly, Gregory's claim of error based on the court's failure to provide a statement of decision fails.

B. Order Distributing Sale Proceeds

Gregory presents various arguments in support of his request that he is entitled to a new trial and determination on the court's distribution of sale proceeds. For the reasons we now explain, we find no basis to reverse and remand for a new trial.

1. Gregory's Fact-Based Arguments

Gregory has forfeited review of any of his fact-based arguments due to the critical inadequacy of the record that he has provided to this court. While Gregory concedes he has the burden of providing an adequate record to assess error, he admits he has not arranged for the lodging of plaintiffs' exhibits which were considered by the trial court at the January 31 bench trial. Instead, he asserts plaintiffs' exhibits are not a proper part of the record as plaintiffs failed to arrange for the lodging of their exhibits in this court (Cal. Rules of Court, rule 8.140), and therefore, this court should decide the appeal based on Gregory's opening brief. However, plaintiffs' failure to designate any portion of the record on appeal does not inure to Gregory's benefit. "It is the appellant's affirmative duty to show error by an adequate record. [Citation.] 'A necessary corollary to this rule

[is] that a record is inadequate, and appellant defaults, if the appellant predicates error only on the part of the record he provides the trial court, but ignores or does not present to the appellate court portions of the proceedings . . . which may provide grounds upon which the decision of the trial court could be affirmed.' " (*Osgood v. Landon* (2005) 127 Cal.App.4th 425, 435; see, e.g., *Hughes v. De Mund* (1936) 7 Cal.2d 504, 505–506 ["[a]ny issues of fact involved in the several assignments of error must necessarily be resolved against the appellant" appearing in propria persona where appellate record "does not purport to contain all of the evidence, and under settled principles, it will be presumed that the omitted evidence supports the findings"].) Because Gregory has failed to provide this court with plaintiffs' exhibits, his challenge to the trial court's findings based on those omitted exhibits has been forfeited. If he "deemed it unnecessary or unwise to include these exhibits in the record on appeal, and has thereby left the record weakened to some extent, he should not now be heard to complain of parts of the findings made by the trial court based [on those exhibits]. We must assume that, in making [its] findings, the [trial] court deemed the evidence supplied by the missing exhibits sufficient to support the findings attacked." (*Supreme Grand Lodge of Ancient and Mystical Order Rosae Crucis v. Smith* (1936) 7 Cal.2d 510, 514.)

Gregory's argument that he had no obligation to provide us with plaintiffs' exhibits is not supported by *Ira v. Ira* (1951) 104 Cal.App.2d 41 (*Ira*). Rather, that case supports our determination that Gregory has forfeited any challenge to the sufficiency of the evidence due to an inadequate record. In *Ira*, appellant claimed he was entitled to reside at a certain property based on his recitation in his brief of "a verbatim copy of a provision" of the parties' agreement. (*Id.* at p. 43.) However, the appellate court found that the trial court's finding, which was based on an agreement attached to defendant's answer, was "conclusive" and appellant "did not establish a right to occupy any portion of the premises" based on his statement as to the contents of the agreement in his brief. (*Ibid.*) Thus, contrary to Gregory's contention, *Ira* stands for the proposition that an

appellant is not entitled to relief based on an argument in his appellate brief that is not supported by evidence that was considered by the trial court in making its decision. So, too, in this case, Gregory cannot claim he is entitled to relief based solely on an argument in his opening brief.

In sum, we conclude that because the trial court's findings were based in substantial part on plaintiffs' exhibits, which have been omitted from the appellate record, the findings *against* Gregory are *conclusive* in that he has not and cannot establish they are contrary to the evidence. Additionally, due to the inadequacy of a record, we cannot and do not address Gregory's arguments that (1) plaintiffs denied or evaded Gregory's discovery requests for two years before trial ; and (2) at the January 31 bench trial the court made certain prejudicial evidentiary rulings and plaintiffs failed to submit evidence of a competent expert to verify that the services rendered by plaintiffs' counsel were for the common benefit of the parties. (See, e.g., *Duronslet v. Kamps* (2012) 203 Cal.App.4th 717, 726 [appellant's failure to object to evidence admitted by the trial court forfeits on appeal the argument such evidence was inadmissible]); *People v. Wilson* (2005) 36 Cal.4th 309, 336 ["[d]efendant failed to object based on attorney-client privilege, and as such, he has forfeited this claim on appeal"]; *In re Riva M*. (1991) 235 Cal.App.3d 403, 411–412 [appellant's failure to object to absence of expert testimony forfeits appellate argument based on absence of such evidence; failure to comply with statutory requirement of expert testimony was not an error that involved the fundamental jurisdiction of the court to act]; *Hayden v. Friedman* (1961) 190 Cal.App.2d 409, 412 [appellate court rejected appellant's claim he was substantially prejudiced by inability to obtain discovery where there was no record from which it might be determined whether appellant had been prejudiced in not securing discovery]; Evid. Code, § 353 ["[a] . . . finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless . . . [t]here appears of

record an objection to or a motion to exclude or to strike the evidence that was timely made . . . "].)

2. Gregory's Legal Arguments

Gregory also contends the trial court's apportionment of plaintiffs' attorney fees and costs should be set aside as a matter of law for various reasons: (1) no action for partition by sale was necessary according to certain provisions in the will of the siblings' deceased mother (hereinafter also referred to as decedent's will) or to resolve the parties' dispute concerning their informal agreement of the use and occupancy of the residence during the cotenancy; (2) plaintiffs failed to comply with certain statutory procedural requirements for maintaining an action in partition including filing of a notice of a lis pendens, appointment of referee to report on evidence relating to reasonableness of attorney fees, ordering an accounting, adjudicating a compensatory adjustment claim; and (3) the trial court failed to apportion defendant's attorney fees and costs incurred in defending the partition action. As we now explain, Gregory's arguments are not persuasive as they demonstrate a fundamental misunderstanding of the law governing this partition action.

a. Provisions of Will of Siblings' Deceased Mother and Siblings' Informal Agreement Concerning Use/Occupancy of Property During Cotenancy

"[I]t is well-known that an estate, as such, may not take title to real property. When a person dies, the title to his real property vests, not in his estate, but in his heirs or devisees, subject to administration." (*Dorland v. Dorland* (1960) 178 Cal.App.2d 664, 669; see Prob. Code, §§ 7000, 7001.) During the administration of a decedent's estate, the administrator or executor of a will has a right to possess any real or personal property and, if appropriate, to sell any property for the payment of the debts and expenses of administration. (*Meeks v. Hahn* (1862) 20 Cal. 620, 627 (*Meeks*).) However, once the estate is settled, the administrator or executor no longer has any authority to possess or sell the property under the terms of the will or the estate administration. (*Matter of*

Estate of Woodworth (1867) 31 Cal. 595, 604; *Meeks*, *supra*, at p. 627.) Based on these principles, it appears from the appellate record that, upon the death of the siblings' mother, title to an undivided one-fourth interest in the property immediately vested in the four siblings as cotenants. But, once the estate was settled, the will's provisions concerning the real property were no longer binding on the cotenants. At that point in time, the cotenants' ownership of the land was free from any restraints that may have been imposed on the property under the will and during the estate administration. At the time plaintiffs filed the action for partition the real property had passed to the cotenants and the will provisions were no longer effective. Thus, plaintiffs did not and could not rely on the will "to establish [their] right to partition," their "right instead arose under the law," and the will provisions were "irrelevant" to their claim. (*Orien v. Lutz* (2017) 16 Cal.App.5th 957, 964 (*Orien*) [plaintiff's right to partition arose under the law governing partition actions and not pursuant to settlement agreement resolving a probate claim allowing a party to file a partition action if they could not agree on sale terms of inherited residences].) Accordingly, Gregory's arguments challenging the court's order of distribution of the sale proceeds based on the provisions of the decedent's will fails and we see no need to consider the probate documents for which Gregory seeks judicial notice (*ante*, fn. 4).

Nor do we see any merit to Gregory's claim that that trial court's order making an equitable distribution of plaintiffs' attorney fees and costs was erroneous as a matter of law as it attempted to adjudicate the parties' dispute regarding their informal agreement concerning the use and payment of expenditures during the cotenancy. As explained by the court in *De Roulet v. Mitchel* (1945) 70 Cal.App.2d 120 (*De Roulet*), "as early as 1272 A.D., when heirs by inheritance could come to no agreement among themselves concerning the division of their property a proceeding might be instituted to compel a partition," and the more recent and "accepted doctrine . . . of the appellate courts of this state [is] that a cotenant is entitled to partition as a matter of absolute right; that he need

not assign any reason for his demand; that it is sufficient if he demands a severance; and that when grounds for a sale are duly established it may be demanded as of right. To grant it is not a mere matter of grace. The only indispensable requirement to its award is that a clear title be shown . . . ." (*Id*. at pp. 123–124.) Thus, while the siblings may have had an informal agreement during the cotenancy, once the partition action was filed Gregory could not defend against partition on the basis of the parties' informal agreement during the cotenancy, or because of any financial loss to the cotenants, or to await a better purchase offer for the property. (*Rich v. Smith* (1915) 26 Cal.App. 775, 783; see *De Roulet, supra*, at p. 124).

b. Compliance with Statutory Requirements to Maintain Partition Action

Gregory contends the trial court erred by allowing for an equitable distribution of plaintiffs' attorney fees and costs because there was no compliance with certain statutory requirements to maintaining a partition action. We see no merit to his contentions.

The statutory procedures governing an action for partition of real property are set out in the Code of Civil Procedure, Title 10.5, Sections 872.010 through 874.240, which provide that the statutes and rules governing practice in civil actions generally apply to partition actions except where they are inconsistent with the provisions of Title 10.5. (§ 872.030.) Section 872.230 provides, in pertinent part, that a complaint in an action in partition shall set forth: "(a) A description of the property that is the subject of the action . . ."; "(b) All interests the plaintiff has or claims in the property"; "(c) All interests of record or actually known to the plaintiff that persons other than plaintiff have or claim in the property and that the plaintiff reasonably believes will be materially affected by the action . . ."; "(d) The estate as to which partition is sought and a prayer for partition of the interests therein"; and "(e) When the plaintiff seeks sale of the property, an allegation of the facts justifying such relief in ordinary and concise language." In addition to those requirements special to an action in partition, the code provides additional requirements governing complaints under section 425.10 et seq. As pertinent here, those provisions

advise that a plaintiff is to include in a complaint a demand for judgment for the relief to which the pleader claims to be entitled, and if a demand for money or damages is demanded, the amount demanded shall be stated. (§ 425.10, subd. (a)(2).)

Plaintiffs' complaint met all the special statutory allegations required to be included in an action for partition under section 872.230. Additionally, plaintiffs specifically included a demand that the court require defendants to pay plaintiffs' reasonable attorney fees and costs related to the partition action. While the complaint did not specifically allege the circumstances giving rise to the request for an equitable apportion of attorney fees and or a specific sum, Gregory could have but failed to file a timely demurrer on the grounds of uncertainty or insufficiency. (*Kaufman v. Pacific Indem. Co.* (1936) 5 Cal.2d 761, 768 (*Kaufman*).) Instead, he filed an answer, he sought an award of reasonable attorney fees and costs, the case was tried, and the trial court fixed a specific sum for reasonable attorney fees and costs and the manner in which the parties would be responsible for that sum from their share of the sale proceeds. Before the May 3, 2017 order may be reversed for insufficiency or uncertainty in the complaint's allegations, Gregory must demonstrate he was "prejudiced by the error." (*Id.*) Our state Constitution mandates that "[n]o judgment shall be set aside, or new trial granted, in any cause, . . . , for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) Here, any insufficiency or uncertainty in the complaint was "cured" by Gregory's failure to object to the complaint on those grounds either prior to trial or at the bench trial held on January 31. (*Kaufman*, *supra*, at p. 768.) Gregory's reliance on section 580's notice requirement to support his claim challenging the complaint's allegations is not persuasive. Section 580 reads, in pertinent part: "The relief granted to the plaintiff, *if there is no answer*, cannot exceed that demanded in the complaint . . . ; *but in any other case*, the court may grant the plaintiff any relief

consistent with the case made by the complaint and embraced within the issue." (Italics added.) Gregory's focus on the first portion of the quoted sentence in section 580, in the case where a defendant has not filed an answer, has no application in this case as he filed an answer to the complaint. Because Gregory filed an answer, it is the second portion of the quoted sentence in section 580 which is applicable in this case, namely, that the trial court had the jurisdiction to adjudicate the issues of the apportionment and specific sums of plaintiffs' reasonable attorney fees and costs for which defendants would be responsible from their share of the sale proceeds. Therefore, Gregory's claim of error based on the complaint's allegations is unavailing.

As to Gregory's arguments concerning the filing of a notice of lis pendens (§ 872.250) and the appointment of a referee (§ 873.010), the courts have determined that even though the statutory provisions under review use the word "shall," as between cotenants, the failure to comply with the statutory provisions is not jurisdictional and will not require relief in the absence of a showing of prejudice. (See *Blackburn v. Bucksport etc. R. R. Co*. (1908) 7 Cal. App. 649, 653 ["it is unimportant whether a [lis pendens] was or was not recorded, so far as this appellant is concerned. He voluntarily submitted himself to the jurisdiction of the court in the case, and we do not think, . . . , that the mere omission to file for record the notice of the pendency of the action affects the question of the court's jurisdiction of the subject matter of the litigation. In other words, we do not think, . . . , that the filing of the notice of the pendency of the action with the county recorder is an essential prerequisite to investing the court with jurisdiction of the subject matter of a suit in which the recordation of such a notice is required"]; *Rutledge*, *supra*, 119 Cal.App.2d at p. 120 [party to partition action cannot assert as a defense the failure to file lis pendens as required under former § 755 [now § 872.250] as the requirement is "merely directory and in the absence of a showing of prejudice will not vitiate a decree" of partition]; *Richmond v. Dofflemyer* (1980) 105 Cal.App.3d 745, 755–756 [even though statute requires trial court "shall" appoint referee appellant was not entitled to reversal

where the court had heard all of the evidence and the appointment of a referee was unnecessary].) Here, we see no prejudice that would warrant a reversal and a new trial based on the purported failure to comply with the filing of a lis pendens and the appointment of a referee. The court apparently concluded it had sufficient evidence before it to make an order of distribution of the sale proceeds including an equitable apportionment of plaintiff's attorney fees and costs. Additionally, the court properly refused to apportion defendant's attorney fees and costs as he proffered no evidence in support of the claim at the January 31 bench trial. By its ruling, the court impliedly found that "it would be a waste of time and money to have a referee review and recommend on those issues." (*Id.* at p. 756.)

We similarly find unavailing Gregory's argument that the trial court committed prejudicial error when it failed to order an accounting and adjudicate his claim for a compensatory adjustment before issuing its order distributing the sale proceeds. The partition statutory scheme allows that "[t]he court *may*, in all cases, order allowance, accounting, contribution, or other compensatory adjustment among the parties according to the principles of equity." (§ 872.140; italics added.) Since 1976, the statutory scheme has also provided that a defendant's answer in a partition action "may set forth any claim the defendant has for contribution or other compensatory adjustment." (§ 872.430). The provision was added "to avoid the need of a defendant to file a cross-complaint for affirmative relief." (See Legis. Comm. Comments-Assembly, 17A Pt. 2 West's Ann. Code Civ. Proc. (2015 ed.) foll. § 872.430, at p. 185.) However, the statutes do not provide, as Gregory suggests, that the trial court is required to order an accounting or adjudicate a cotenant's compensatory adjustment in the absence of a request for such relief and notice to the parties that the court is considering those issues. Gregory gave no notice in his answer that he was seeking either an accounting or adjudication of a compensatory adjustment claim. At the January 31 bench trial, Gregory made no request for the court to order an accounting, and, although the trial court alerted him to the

problem in his answer regarding his request for a compensatory adjustment, Gregory did not seek leave to amend his answer to add a compensatory adjustment claim even though such relief was available to him at that time. Section 473 specifically allows a defendant to seek leave to amend his answer at any time before the matter is submitted to the court for its decision, and the court may grant such relief, in the furtherance of justice, and on any terms that may be proper, including postponing a trial when the amendment to an answer is found to be necessary. (*Id.*, subd. (a)(1), (2); see also *County of Los Angeles v. Estes* (1979) 96 Cal.App.3d 513, 516 [appellate court found no merit to self-represented appellant's claim that trial court's failure to advise him of his right to obtain a continuance constituted a denial of due process and equal protection of the law as guaranteed by the United States and the California Constitutions].) Because no timely and procedurally appropriate request for a compensatory adjustment was made in the trial court, plaintiffs had no adequate opportunity to address any of Gregory's factual assertions concerning a compensatory adjustment based on expenditures he purportedly made during the cotenancy. Because the court properly denied Gregory's request to present evidence on a compensatory adjustment claim for failure to include the claim in his answer, we need not address the court's other reasons for denying Gregory's request. "On appeal we consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons* for reaching its decision." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.) "If right upon any theory of law applicable to the case, [the trial court's ruling] must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*People v. Jones* (2012) 54 Cal.4th 1, 50.) Nor did Gregory seek to put the matters of the omitted accounting and compensatory adjustment before the trial court by filing a post-judgment motion for a new trial under section 657. Rather, he chose to file an opposition to plaintiffs' trial brief, which the court appropriately rejected as being untimely filed after the case had been submitted for decision.

In sum Gregory has forfeited any appellate claim that the trial court committed prejudicial error by failing to comply with section 872.140, in the absence of timely and procedurally appropriate requests for an accounting or adjudication of a compensatory adjustment. (See *Hepner v. Franchise Tax Bd.* (1997) 52 Cal.App.4th 1475, 1486 ["[p]oints not raised in the trial court will not be considered on appeal"].) Our explanation for so ruling is that we will " 'ordinarily not consider procedural defects . . . in connection with . . . defenses asserted, where an objection could have been but was not presented to the [trial] court by some appropriate method. . . . [T]he explanation [for the rule] is simply that it is *unfair to the trial judge and to the adverse party* to take advantage of an error on appeal when it could easily have been corrected at the trial.' [Citation.]" (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184–185, fn. 1.) Therefore, Gregory's claim of error concerning an accounting and adjudication of a compensatory adjustment fails.

c. Court's Equitable Apportionment of Plaintiffs' Reasonable Attorney Fees and Costs

We reject Gregory's argument that the trial court erred as a matter of law in making its determination of apportionment of plaintiffs' reasonable attorney fees and costs. Section 874.010 provides, in pertinent part, that "[t]he costs of partition include: [¶] (a) [r]easonable attorney's fees incurred or paid by a party for the common benefit. [¶] . . . [¶] (e) [o]ther disbursements or expenses determined by the court to have been incurred or paid for the common benefit." Section 874.040, which governs the apportionment of costs, provides, in pertinent part: "[T]he court shall apportion the costs of partition among the parties in proportion to their interests or *make such other apportionment as may be equitable*." (Italics added.) As explained by the court in *Lin v. Jeng* (2012) 203 Cal.App.4th 1008 (*Lin*): "There is no ambiguity in the language of section 874.040. It simply states that the trial court must apportion the costs incurred in a partition action based upon *either* the parties' interests in the property, or equitable

considerations. The statute's broad language does not limit the trial court's equitable distribution . . . ." (*Id.* at p. 1025.) In so concluding, the *Lin* court declined to follow *Finney v. Gomez* (2003) 111 Cal.App.4th 527 (*Finney*), in which "the appellate court stated that '[s]ection 874.040 has been consistently interpreted as giving courts only two options in apportioning the costs and fees of a partition action. The court may apportion the fees and costs based on the parties' respective interests in the property, or it may apportion the costs and fees based on some other equitable apportionment.' (*Finney, supra,* 111 Cal.App.4th at p. 545.) The [*Finney*] court went on to state that the Law Revision Commission comments to section 874.040 set forth the only two circumstances under which a trial court may make an equitable apportionment – where the litigation arises among only some of the parties, or where the interest of the parties in all items, lots, or parcels of property is not identical. (111 Cal.App.4th at pp. 545–546.)" (*Lin, supra,* at p. 1023.) The *Lin* court disagreed with the *Finney* court's analysis, which was based on cases "decided under a different version of the applicable statute." (*Lin, supra,* at p. 1023, fn. omitted.)

The *Lin* court's decision is both persuasive and dispositive of Gregory's legal contention. In interpreting statutes, "[o]ur first and most important responsibility . . . is to consider the words employed." (*People v Jacobs* (2000) 78 Cal.App.4th 1444, 1450.) "If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) . . . ." (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.) Thus, based upon the unambiguous language in section 874.040, we conclude the trial court had the statutory discretion to make an equitable apportionment of plaintiffs' attorney fees and costs, which was disproportionate to the parties' ownership shares in the property. Accordingly, Gregory's claim of error on this ground fails.

We also reject Gregory's argument that the trial court erred as a matter of law in refusing to apportion the attorney fees and costs that he incurred in defending the partition action. He correctly notes that the trial court may apportion the payment of reasonable attorney fees and costs incurred by all parties, both plaintiffs and defendants,

for services rendered for the common benefit of the cotenants, " 'even in contested partition suits.' " (*Riley v. Turpin* (1960) 53 Cal.2d 598, 602–603, citing to *Capuccio v. Caire* (1932) 215 Cal. 518, 528–529; *Orien*, *supra*, 16 Cal.App.5th at pp. 966–967.) However, we see no support in the record for Gregory's further assertion that "the trial court mistakenly rejected his expenditure of attorney's fees that were supported by direct evidence in contravention of well settled equitable principles applicable to the case." At the January 31 bench trial, the trial court recognized Gregory's legal right to request an apportionment of his attorney fees and costs that were incurred for the common benefit of the cotenants. However, the court properly denied Gregory's request because he failed to submit copies of his former counsel's billing invoices for attorney fees and costs and evidence demonstrating the attorney fees and costs were incurred for the common benefit of the cotenants. A request for an apportionment of attorney fees and costs requires the trial court to make factual determinations as to their reasonableness and whether they were incurred for the common benefit. In the absence of an adequate record in the trial court, Gregory's claim of error cannot be raised for the first time on appeal. Accordingly, Gregory's argument that the trial court failed to comply with the law by not apportioning his attorney fees and costs fails.

DISPOSITION

The appeal from the November 15, 2016, "order after hearing," is dismissed. The "order after hearing," filed May 3, 2017, is affirmed. Plaintiffs are entitled to their costs on appeal. (Cal. Rules of Court, rule 8.278 (a)(1), (2).)

_____

Petrou, J.

WE CONCUR:

_____

Siggins, P.J.

_____
Fujisaki, J.

Malone et al. v. Taylor/A151906